GOODWIN | PROCTER

Robert T. Basseches
202.346.4201
rbasseches@
goodwinprocter.com

Goodwin Procter LLP
Counsellors at Law
901 New York Avenue, N.W.
Washington, D.C. 20001
T: 202.346.4000
F: 202.346.4444

March 9, 2006

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of Agriculture
1400 Independence Avenue, SW
Room 5755-S
Washington, DC 20250-0512

(mail address)

Richard.Chavez@USDA.gov

(e-mail address)

Re: Procurement of Commodities For Foreign Donation, 72 CFR Part 1496, RIN 0650-AH39

Enclosed for filing in the above-referenced matter are the Comments of American President Lines, Ltd., CP Ships USA, LLC and Maersk Line and the exhibits thereto.

Sincerely yours,

Robert T. Basseches

RTB:nnv
Enclosure

cc: Charles E. Boggs (by e-mail)
Charles B. Weymouth (by e-mail)
James G. Dorrian (by e-mail)

Department of Agriculture
Commodity Credit Corporation

Procurement of Commodities
For Foreign Donation
72 CFR Part 1496
RIN 0650-AH39

Comments of American President
Lines, Ltd., CP Ships USA, LLC
and Maersk Line

These Comments addressed to the above-identified Proposed Rule are submitted by American President Lines, Ltd., CP Ships USA, LLC and Maersk Line (collectively referenced herein as "APL/CPS/ML"), pursuant to the *Federal Register* notice of December 16, 2005 (70 *Fed. Reg.* 74717) as amended by *Federal Register* notice of January 23, 2006 (71 *Fed. Reg.* 3442). In brief, while APL/CPS/ML support the Commodity Credit Corporation's ("CCC") stated objective of improving the efficiency of the procurement of commodities and ocean transportation services in support of the United States Government's humanitarian food aid programs, it is our position:

(a) that as a procedural matter, the CCC notice does not provide an opportunity for informed or meaningful comment, *inter alia*, because that notice entirely fails to identify the operational details of the proposed, revised procurement procedures, with a resulting inability of relevant stakeholders to evaluate the impact of the proposed changes; and

(b) that as a substantive matter, the proposed revised procurement procedures are significantly impacted by the numerous and longstanding unresolved uncertainties and disputes over the standards for award of ocean transportation contracts for carriage of humanitarian food

aid cargo, with the result that new bid evaluation procedures cannot appropriately be established in isolation from, and without consideration and resolution of those standards.

We address these issues below, after identifying APL/CPS/ML's important interest in the Proposed Rule.

A. APL/CPS/ML

APL, CP Ships, and Maersk Line operate 51 U.S.-flag liner vessels that routinely provide for the carriage of humanitarian food aid cargo – as well as provide service to commercial shippers and to U.S.-Government customers, including, in addition to the Department of Agriculture ("DOA") and USAID, the Department of Defense ("DOD"), the Department of State, and the U.S. Postal Service. Those vessels are state-of-the-art containerships, are supported by extensive, worldwide intermodal systems, are enrolled in the VISA (Voluntary Intermodal Sealift Agreement) program, and, as to 43 of the vessels, are participants in the Department of Defense/Maritime Administration ("MarAd") Maritime Security Fleet Program.

According to MarAd data, in 2004, APL, CPS and ML combined provided transportation on their U.S.-flag vessels for 48.7% of the packaged cargo moving on liner vessels pursuant to the humanitarian food aid programs (PL 480 Title I and II, Food for Progress, Section 416b and Food for Education) and 46.4% in 2005.[1]

Given the extensive commitment of APL/CPS/ML to the humanitarian food aid programs, it is obvious that any proposed change in procedures that could affect their participation in the programs – including, particularly, the change of procedures being proposed in the current rulemaking – is of importance to them. Moreover, it is also of obvious importance to the U.S. Government entities that are responsible for the programs, as well as the other

---

[1] Information provided by MarAd based on data available as of January 24, 2006. It includes food aid cargo moving via Great Lakes ports pursuant to Section 17 of the Maritime Security Act of 1996.

stakeholders that participate in and implement those programs. The level of APL/CPS/ML's participation in the programs demonstrates that their services are being provided on an efficient and cost-effective basis. Thus, any change in the procurement procedures that would impair APL/CPS/ML's ability to continue to provide those services would operate to the detriment not only of the APL/CPS/ML but also to the U.S. Government and the other stakeholders. While the *Federal Register* notice of the Proposed Rule provides no explanation of the methodological criteria that will implement the contemplated changes in the procurement processes, it identifies the expectation that the changes will significantly impact the many stakeholders participating in the multi-billion-dollar humanitarian food aid programs, including the U.S. port locations from which humanitarian food aid cargo will be shipped and the distribution of cargo among the carriers participating in the carriage of humanitarian food aid programs. [See 70 *Fed. Reg.* 74718]

B. The Context In Which The Proposed Rule Must Be Considered

CCC appears to believe it appropriate to depart from decades-long procedures for the procurement of commodities and ocean transportation services for those commodities, and to adopt new procedures, with no acknowledgement whatever of the complex and uncertain standards that govern the underlying award activities, with virtually no analysis of the potential implications of the revised procedures to the relevant stakeholders participating in the underlying programs, and indeed before the mechanism to implement the revised procedure has been finalized, tested and explained to interested stakeholders, including, we understand, MarAd.

The Proposed Rule would amend 7 C.F.R. §1496.1, to define "the policies, procedures and requirements" governing the procurement of donated agricultural commodities "under Title II of the Agricultural Trade Development and Assistance Act of 1954 (P.L. 480); the Food

for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other program under which CCC is authorized to provide agriculture commodities for assistance overseas." Although not specifically listed, we assume the Proposed Rule is also intended to cover donations under Section 416 of the Agricultural Act of 1949.[2]

Two government departments or agencies, in addition to CCC, have important and overlapping responsibilities for the effective implementation of these programs – USAID with respect to Title II, and MarAd with respect to all of the identified programs by virtue of MarAd's responsibilities under the Cargo Preference Act of 1954 (46 USC App. 1241(b)) and the Food Security Act of 1985 (46 USC App. 1241f). All three agencies have regulations addressed to the administration of these programs.[3] For the most part, however, those regulations have not been materially updated to reflect the dramatic changes in the ocean transportation environment that have evolved since the regulations were initially adopted, or to resolve the many ambiguities over the implementation of the programs that have been a recurring source of conflict and uncertainty.

Those ambiguities and conflicts, of course, are longstanding. In 1970, Congress amended the Cargo Preference Act to vest the Secretary of Transportation with authority to adopt regulations to govern the manner in which the departments and agencies responsible for, *inter alia*, U.S. foreign aid comply with the U.S.-flag Cargo Preference requirements. This was considered essential because (S.Rept. No. 1080, 91st Cong., 2d Sess., pp. 58-59) (emphasis supplied):

> "Although the cargo preference program is generally recognized as an important pillar of our maritime policy, its administration has

---

2 Current Part 1496 in terms applies only to Title II, Pub. L. 480. See 7 CFR §1496.4.

3 7 C.F.R. Parts 1496, 1499 (Commodity Credit Corporation); 22 C.F.R. Parts 201, 211 (USAID); 46 C.F.R. Part 381 (MarAd);

> tended to be uneven and chaotic. *A lack of uniform and rational administration has worked to the disadvantage of shippers, carriers, and various geographic areas of our nation, * * *.*"

It is of direct relevance to the legitimacy of the pending rulemaking that the clarity and uniformity of conditions that the 1970 legislation was designed to achieve have wholly failed to materialize. To the contrary, the administration of the humanitarian food aid programs as they relate to the procurement of ocean transportation continues *ad hoc*. Indeed, as we demonstrate below, the process is marked by recurring disputes between the responsible government agencies that leave the private stakeholders – and the agencies themselves – uncertain of and in dispute over the ground rules that apply. The following are but a few examples of the unresolved issues and unclear standards that prevail and that make the adoption of revised procurement procedures inappropriate until some semblance of clarity in the underlying ground rules is achieved.

1. In 1994, the Administrator of the Agricultural Stabilization and Conservation Service and the Maritime Administration engaged in a very public disagreement on the issue of whether, with respect to Title II, P.L. 480 cargo, lowest-landed-cost awards for U.S.-flag service should be prioritized based on service availability from an individual U.S. port or on a nationwide basis. (Copies of the correspondence are attached as Exhibits 1 and 2.)

2. The issue resurfaced in 1998, in litigation that was settled based on DOA's agreement, for purposes of the Food for Progress and Section 416(b) programs only, to make its awards based on a prioritization of U.S.-flag service on a nationwide basis. (A copy of the Settlement Order in *Farrell Lines Incorporated* v. *U.S. Dept. of Agriculture*, Civil Action 98CV02046 (D. D.C.) is attached as Exhibit 3.) As a result, pending further clarification, FAS awards for Title II purposes can be based on U.S.-flag offerings at a port or point, and for the Food for Progress and Section 416(b) programs on a nationwide basis.

3. In 1999, MarAd issued an advance notice of a proposed rulemaking respecting issues addressed to the application of the cargo preference laws to the humanitarian food aid programs. Docket No. MarAd-99-5038, 64 *Fed. Reg.* 4382 (Jan. 28, 1999). Among the issues addressed in the ANPRM were (i) the assignment of priorities when U.S.-flag vessels utilized foreign-flag feeder vessels part way; (ii) the definition of vessel type for purposes of the Cargo Preference Act's requirement that the U.S.-flag preference be "computed separately" according to vessel type; and (iii) the definition of the commercial terms underlying the commodity purchase transactions – *e.g.*, FAS[4] – all of which impact on the lowest-landed-cost evaluation. While the rulemaking did not progress beyond the ANPR stage, comments filed by USAID addressed to the MarAd notice provide clear demonstration of the confused standards that govern food aid awards:[5]

> "USAID commends MarAd for starting the much-needed process of regulatory reform. However, we are disappointed that MARAD has not taken this opportunity to fully vet the issue of Cargo Preference Compliance. * * * Many issues have arisen over the years as the result of a changing maritime industry or changing federal programs. *These issues have been addressed agency by agency on an ad hoc, rather than a comprehensive, basis. We now have a web of Comptroller General Opinions, internal MARAD legal opinions and court decisions that interpret regulations that are no longer on point. Having rules, definitions or procedures that differ from one agency to another leads to confusion, misinterpretation and a sense of inequality.*
>
> We recommend that MARAD conduct a review of this array of past practices, policies, regulations and legal guidance to determine what is appropriate in view of the changing maritime industry and federal programs."

---

4 The application of FAS terms in determining lowest landed cost determinations is the subject of disagreement, as illustrated by the reference by the MarAd Director of the Office of Cargo Preference to CCC's "improper FAS use" in a May, 2005 presentation at the annual Food Aid Conference. See Exhibit 4.

5 April 28, 1999 Comments of Chief, USAID Transportation and Commodity Division, Office of Procurement, Exhibit 5 hereto (emphasis supplied).

It is no small irony that these criticisms by USAID addressed to the relevant regulatory environment at MarAd were very recently echoed by USAID with respect to its own administration of the Title II program. USAID recently reported to Congress that:[6]

> "Basic regulatory guidance for Title II is outdated and needs to be updated. *The lack of updated regulations causes reliance on "ad hoc" interpretations, a long outdated Handbook, and internal memoranda, emails and notes that are not codified, sometimes inconsistent, and occasionally forgotten.*"

4. One issue identified in MarAd's 1999 ANPR came to a head in a 2001 District Court action initiated by Victory Maritime Inc. against USAID, DOA and MarAd, challenging the allocation of cargo moving under the Title II program to foreign-flag liner vessels when the participation of U.S.-flag liner vessels was below the statutory minimum. Among the issues in dispute in the litigation was how the "computed separately" requirement of the Cargo Preference Act should be administered, and how the statutorily prescribed categories – liner, dry bulk and tanker – should be defined. The case has relevance not only with respect to the substantive issues in dispute but is further indication of the state of uncertainty as to the prevailing ground rules respecting the procurement procedures applicable to the humanitarian food-aid programs and as to the application of the cargo-preference requirements to those programs. This uncertainty is graphically identified in a series of motions by which the United States Department of Justice sought extensions of time to respond to the Victory Maritime complaint, explaining that:[7]

---

[6] Final Report Submitted to the Congress by The United States Agency for International Development, Streamlining The PL 480 Title II Program (July 31, 2003) at pages 8, 10 (emphasis supplied). In its earlier Interim Report to Congress (March 31, 2003), USAID identified that "the procedures used by the U.S. Department of Agriculture in its management of food and activities are also very relevant" and that the "Title II streamlining effort must include the participation of Cooperating Sponsors, as well as critical business interests in the commodity, transportation and related support activities." (p. 4)

[7] *E.g.*, Consent Motion For Further Enlargement of Time and Statement of Points and Authorities In Support Thereof, August 20, 2001 (Exhibit 6 hereto) (emphasis supplied).

> "This case, and the two related cases, concerns the interpretation of the Cargo Preference Act. *The federal agencies which are the defendants in the litigation have admittedly not interpreted the statutory provisions at issue in a uniform manner.*
>
> The defendant agencies' differing interpretations of the Cargo Preference Act have been referred to appropriate officials at the Department of Justice, who are reviewing the matter with a view toward resolving the conflict so that there will be a unitary position of the United States with respect to plaintiffs' claims."

5. For the last several years MarAd has continued its efforts to update its regulations to clarify the application of the Cargo Preference Act to the food-aid programs, including the standards for awards underlying the lowest-landed cost determination to be applied by USAID and DOA in implementing procurements. Those efforts have failed. The widely circulated rumor that the failure was due to DOA and USAID opposition before OMB appears confirmed by a January 8, 2004 e-mail from MarAd's Director, Office of Cargo Preference to a number of interested, private parties, stating (the email is attached as Exhibit 7) (emphasis supplied):[8]

> "As you know, we are continuing our efforts to update the cargo preference regulations. The proposed regulations are at OMB for clearance prior to publishing them for public comment. *AID and USDA are requesting many changes to the proposal before we request public comment.*"

6. These same interagency conflicts continue under DOA's current rulemaking. It is common knowledge that MarAd has been excluded from participating in the development of the architecture for the planned revised procurement procedure, that it was not given prior notice of the publication of the proposed rule, and that it is only through its direct protest to OMB that,

---

[8] Other outstanding issues that affect lowest-landed-cost determinations applicable to both commodity and carrier awards include, *inter alia*: service criteria to insure carrier performance capability; vessel classification standards to comply with statutory "computed separately" requirement; application of waterborne first-lift criteria; implementation of the ship U.S.-flag first objective; "fair and reasonable" rate methodology; methodology to be used in conjunction with Section 17 evaluation; standards for non-availability determinations; rate structure criteria.

very much after the fact, it has been given a seat at the table where the revised procurement procedures are being developed.

C. CCC Cannot Adopt New Procurement Procedures Until the Relevant Standards Governing the Procurements Have Been Clarified

In response to the December 16, 2005 *Federal Register* notice, CCC received a large number of expressions of concern, incident to requests for an extension of the highly truncated time to comment on the Proposed Rule established in CCC's notice. These came from all areas of interested parties including commodity suppliers, port authorities, and the major trade associations representing U.S.-ship operating companies in addition to a number of individual carriers. The position articulated in these filings was direct and consistent, namely, that the new procedures being proposed by CCC have the potential to materially and adversely impact on the responding entities and that information as to the proposed procedures is too limited to permit interested parties to perform an informed evaluation for comment on the Proposed Rule:

- The January 9, 2006 joint filing on behalf of the American Maritime Congress, Transportation Institute, and Maritime Institute for Research and Industrial Development, for example, urged a joint meeting between CCC and affected maritime interests "for the purpose of learning more and exchanging ideas about how your [the Commodity Procurement Policy & Analysis Division] office envisages that this Proposed Rule would work, potential savings, and its effect on U.S.-flag liner and bulk carriers and compliance with the cargo preference laws * * *."

- Noting that "the conceptual and programmatic systems to accomplish this [the Proposed Rule's] goal remain work-in-progress at this writing," Sealift (filing of January 9, 2006) identified its "genuine concerns about whether the contemplated system can accommodate the

commercial realities of the current bid system * * *," and suggested that the opportunity for comment on the proposed rule be postponed until the system was more fully developed and vetted.

- Liberty (filing of January 6, 2006) stated the position that a revision of the longstanding procedures should be undertaken only "with careful consideration of the consequences and effects," identifying, moreover, that:

> "the affected regulation is only a piece in a much broader and complicated mosaic of statutes and regulations. Most of the underlying food-aid programs have been in existence for more than 50 years. There are also overlapping laws and regulations more directly affecting ocean transportation providers. Some of those considerations emanate from laws not administered by USDA. We urge USDA to pause to be sure that as many complications as possible are considered."

- American Cargo Transport (filing of January 17, 2006) emphasized the need "of learning more * * * about how * * * this Proposed Rule would work * * *."

- Didion Milling expressed concerns about "proposed changes that may effect the port allocations and selection of the carrier" and that "may permit the return of negative business practices * * *."

- Transfer Logistics, in written comments presented at a public meeting conducted by CCC on February 21, 2006, expressed its reluctance:

> "to sit by and watch a change in procedure without a full and open disclosure of the process. Such a full and open disclosure would need to provide a mechanism such that all interested parties including relevant Government Agencies, Commodity Suppliers, Ocean Carriers and Port Facilities would have the opportunity to weigh in their concerns and then see the exact procedures that will be used to determine bid awards under a new system."

* * * * *

At least two clear themes characterize the context of CCC's proposed rulemaking. The first, which emerges from the private-party filings in this docket, is that the opportunity of interested parties to make meaningful comment addressed to the substance of the Proposed Rule does not currently exist given the void of information as to how the procurement mechanism will be structured and, more generally, the profound uncertainty as to the standards that will be employed under the procurement mechanism. We show in Part 1 below that CCC is required to clarify the issues and place them squarely before the affected parties so that they can meaningfully participate in this rulemaking.

We address in Part 2 below the related and equally obvious theme in this rulemaking context that the regulatory regimes governing the procurement of humanitarian aid cargo, and the application of the Cargo Preference laws to those programs, are not only incomplete and out-of-date but are the subject of vigorous disagreement *among the affected agencies themselves*. Indeed, the lack of clarity regarding what changes are being proposed by CCC, and thus how the interests of the various stakeholders will be impacted by those changes, is exacerbated by these interagency conflicts. As we explain, interagency coordination in this important rulemaking is necessary to identify and dispel the substantive uncertainties and to address the interagency conflicts that have far too long characterized the food-aid programs. We also show that such coordination is in any event compelled by the enabling statutes themselves.

1. Substantive Clarity. An essential element of APA Notice and Comment procedure is that interested persons shall be given "an opportunity to participate in the rulemaking through submission of written data, views or arguments * * *." 5 U.S.C. §553(c).[9] The APA likewise commands that "notice of proposed rule making . . . . shall include . . . either the terms or

[9] As identified *infra*, notice and comment is also required under the Agricultural Trade Development and Assistance Act of 1954 with respect to guidelines to be issued under that statute.

substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). It is self evident that the opportunity to participate must be more than mere tokenism; specifically, "[n]otice of a proposed rule must include sufficient detail on its content and basis in law and evidence *to allow for meaningful and informed comment* . . . ."[10] Under that standard, a final rule will be invalidated if, compared to the notice proposing it to the public, would-be commenters are only provided "*their first occasion to offer new and different criticisms which the agency might find convincing*"[11] at a time when it is too late for the agency to consider their comments.

This important limitation on agency action is drawn sharply into focus by CCC's proposal to superimpose its rule upon what one commenter (Liberty) aptly described as a "much broader and complicated mosaic of statutes and regulations" – one that USAID itself called a patchwork of "'ad hoc' interpretations, a long outdated Handbook, and internal memoranda, emails and notes that are not codified, sometimes inconsistent, and occasionally forgotten."[12] The problem here is that unless and until CCC explains how the proposed rule "would work . . . [or] its effect on U.S.-flag liner and bulk carriers and compliance with the cargo preference laws,"[13] the right of the stakeholders in the food-aid procurement process meaningfully to participate in the rulemaking is irretrievably lost.

This last comment in particular hints at another flaw in this rulemaking process because it underscores the complex interrelationship between CCC's proposed rule and others touching the

---

10 *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995). See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("th[e] right to be heard has little reality or worth unless one is informed," and thus a constitutionally proper "notice must be of such nature as reasonably to convey the required information . . . .").

11 *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1059 (D.C. Cir. 2000) (emphasis added).

12 See *supra* n.6.

13 January 9, 2006 comments in this docket of American Maritime Congress, Transportation Institute and Maritime Institute for Research and Industrial Development.

same subject matters. The specific flaw is that CCC cannot possibly satisfy its rulemaking obligations unless it first identifies the various conflicts that its proposed rule would engender vis-à-vis the regulations of other agencies – here, USAID and MarAd. As a panel of the D.C. Circuit broadly explained in *New York Shipping v. Federal Maritime Commission*:

> "[A]n agency, faced with alternative methods of effectuating the policies of statutes it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime." 854 F.2d 1338, 1370 (D.C. Cir. 1988).

See also, *e.g.*, *Yukon-Kuskokwim Health Corporation v. NLRB*, 234 F.3d 714, 718 (D.C. Cir. 2000) (NLRB violated its "obligation to address and to minimize conflict with another statutory regime . . . .").

For all of these reasons, the rulemaking cannot properly move forward until information is made available that permits interested persons an opportunity to properly understand the substance of what is being proposed in the rule.

2. Coordination. The statutes authorizing the CCC regulations on procurement of processed agricultural commodities for donation – *i.e.*, the Agricultural Trade Development and Assistance Act of 1954 ("ATDAA"), and the Merchant Marine Act of 1936 – require interagency coordination in the implementation of the humanitarian food-aid programs. The ATDAA, thus, mandates interagency coordination by "establish[ing] a Food Aid Consultative Group [consisting of various government agencies and affected private members[14]] . . . to review

---

[14] The Group includes the USAID Administrator, the Under Secretary of Agriculture for Farm and Foreign Agricultural Services, the Inspector General of USAID, and representatives of private voluntary organizations, NGO's, and designated agricultural producer groups. *Id.* § 1725(b). Although MarAd is not made a member of the Group by the terms of the statute, the Merchant Marine Act of 1936 brings CCC under the MarAd regulations and establishes the centrality of MarAd to the food-aid-procurement process, as we explain in the next paragraph.

and address issues concerning the effectiveness of the regulations and procedures that govern food assistance programs . . . ." 7 U.S.C. § 1725(b). The provision further directs that proposed regulations – including those such as are the subject of these comments – be presented for consideration and comment by the Group. *Id.* § 1725(d). The Food Aid Consultative Group is thus a primary vehicle by which the various agencies with ATDAA responsibility (DOA/CCC and USAID) develop appropriate regulations to coordinate their various interests and responsibilities. Those provisions of ATDAA, accordingly, provide direct evidence of Congress's recognition that coordination among the affected agencies is indispensable to the rulemaking process for the multi-agency, multi-stakeholder U.S. food assistance programs.

That "legislative fact" is further evidenced by the Merchant Marine Act, which mandates that "[e]very department or agency *having responsibility* under this subsection [46 app. U.S.C. § 1241] shall administer its programs with respect to this subsection *under regulations issued by the Secretary of Transportation.*"[15] Because the CCC has responsibility under the Merchant Marine Act,[16] the Act requires CCC to administer its procurement programs "under" MarAd regulations – and, by necessity, in coordination with MarAd.

Together, these provisions – one establishing the interagency Food Aid Consultative Group; another commanding that CCC "administer its programs under [MarAd] regulations" – place beyond dispute the fact that *coordination* among the affected agencies is an important aspect of the humanitarian food-aid programs. Moreover, coordination with the private stakeholders in the development of regulations applicable to the humanitarian food-aid program is itself statutorily compelled in the ATDAA, which explicitly requires that DOA "provide notice

---

[15] 46 App. U.S.C. § 1241(b)(2) (emphasis supplied).

[16] *Id.* ("[w]henever the United States shall procure . . . commodities . . . the appropriate agency or agencies [here, CCC as the procuring agency,] shall take such steps as may be necessary and practicable to assure" that certain prescribed minimum U.S.-flag carrier quotas are satisfied).

of the existence of a proposed guideline [which] * * * is available for review and comment, to eligible organizations that participate in programs under this subchapter, and to other interested persons." 7 U.S.C. § 1726a(b).

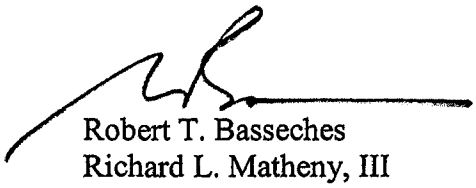
It follows that any failure by CCC to provide for interagency coordination in the proposed rulemaking risks invalidation under the APA's provision that "agency action, findings, and conclusions found to be . . . *arbitrary and capricious*" is unlawful and shall be set aside. 5 U.S.C. § 706(2)(A) (emphasis supplied); *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary-and-capricious standard requires agencies to consider "important aspect[s]" of a matter that they are addressing by agency action).

D. CONCLUSION

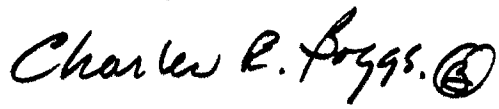
As we identified at the outset, APL/CPS/ML are fully supportive of the objective of improved efficiency and economy in the procurement of commodities and freight services to implement our Government's humanitarian food aid efforts. However, the Proposed Rule, at least at its current stage of development, does not provide any indication that it will achieve those results in a fair, orderly, or legally sustainable manner. For the reasons identified above, it would be improper for CCC to superimpose on the procurement process for commodities and ocean transportation a new set of rules without (i) plainly and fully identifying the terms and substance of its proposed rule, its operational relationship to related regulations of other agencies, and its affect on the interests of the various stakeholders in the food-aid procurement process, thus providing those stakeholders the opportunity for meaningful comment (which is currently lacking under the Proposed Rule as published); and (ii) coordinating with the two other affected agencies – USAID and MarAd – to update and clarify the underlying substantive

requirements.[17] Only through such a process of participation, integration, and harmonization can CCC satisfy the multiple commands of the APA and of the statutes that authorize food-aid procurement, and appropriately address the interests of the multiple stakeholders affected by the food-aid procurement program.

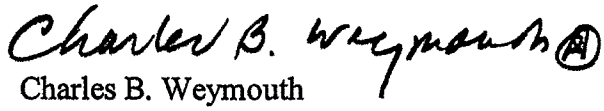
Respectfully submitted,



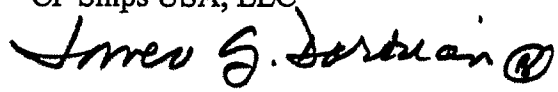
Robert T. Basseches
Richard L. Matheny, III
Goodwin Procter, LLP
901 New York Avenue, NW
Washington, DC 20001
Of Counsel to American President Lines, Ltd.



Charles E. Boggs
Vice President, Humanitarian Aid
American President Lines, Ltd.



Charles B. Weymouth
Director Government Affairs
CP Ships USA, LLC



James G. Dorrian
Director Government Marketing
Maersk Line

March 9, 2006

---

[17] "Where overlapping or related jurisdiction exists, it is clearly essential that the agencies involved consult with one another at the earliest possible stage in the rulemaking proceedings. . . . Whether coordination is legally required [by statute] or has been undertaken as a matter of agency discretion and good management, the agency's posture will be much better in relation to other agencies, the courts, and the public if interagency coordination and review begins early and continues throughout the rulemaking process." Jeffrey S. Lubbers, *A Guide To Federal Agency Rulemaking*, at 248–49 (3d ed. 1998).

EXHIBIT 1

U.S. Department of Transportation
Maritime Administration

Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

07 MAR 1994

Mr. Grant Buntrock
Administrator
Agricultural Stabilization
and Conservation Service
P.O. Box 2415
Washington, D.C. 20013

Dear Mr. Buntrock:

It has been called to our attention that the Agricultural Stabilization and Conservation Service's (ASCS) Kansas City Commodity Office (KCCO) issued an invitation to bid, Invitation 024, dated January 25, 1994, requesting ocean shipment of certain P.L. 480 Title II cargoes. The invitation specifies laydays during the period March 6, 1994, through April 15, 1994, and includes cargoes destined to numerous geographic areas throughout the world including India.

It appears that KCCO allocated 15,000 metric tons of cargo, based on lowest landed cost, destined to India via the U.S. ports of Tacoma, Washington, and Long Beach, California, that did not have direct U.S.-flag service. This cargo was fixed on U.S.-flag carriers (Sea-Land Service, Inc. and American President Lines) that provide service to India via foreign flag feeder service.

It is our understanding that this cargo should have been allocated to other ports and fixed on U.S.-flag vessels that provide direct U.S.-flag carriage. Our position on this matter is founded on numerous decisions issued by the Comptroller General of the United States (copies enclosed), which reaffirm our requirement that priority be given to carriers providing all U.S.-flag service to destination ports prior to contracting for services providing U.S.-flag service utilizing foreign flag vessels to complete the delivery process. Based on the foregoing, we are unable to apply these voyages toward your agency's 75 percent U.S.-flag requirement and disclaim liability for any applicable ocean freight differential that may have been incurred.

Therefore, I am requesting that you carefully review the enclosed and ensure that future preference shipments are flagged first to U.S. carriers providing all U.S. service before fixing U.S. carriers utilizing foreign feeder service.

Should you need additional information, I will be happy to meet with you to discuss this matter.

Sincerely,

A. J. Herberger
Maritime Administrator

Enclosure

EXHIBIT 2

United States Department of Agriculture

Agricultural Stabilization and Conservation Service

P.O. Box 2415
Washington, D.C.
20013

MAR 31 1994

Mr. A. J. Herberger
Administrator
Maritime Administration
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Mr. Herberger:

Your letter contesting the manner in which the Commodity Credit Corporation (CCC) recently contracted for Title II, P.L. 480 commodity shipments to India has been reviewed. We are surprised by the Maritime Administration's (MARAD) objections to our policy as it relates to the prioritization of U.S.-flag service. The current CCC policy has been in effect for a number of years and is a policy that has been known and endorsed by MARAD. We disagree with your conclusions.

Our first point of disagreement is the point at which MARAD's prioritization of U.S.-flag shipping service must be considered. This hierarchy of prioritizing U.S.-flag shipping services is based upon the U.S. port of origin of the commodities. In the case of the shipments to India, the ports of origin were on the West Coast. As such, the U.S.-flag service with foreign flag feeder to destination was considered as qualifying under cargo preference since no other U.S.-flag carrier offered all U.S.-flag service to India from West Coast ports. This is consistent with the Comptroller General opinions enclosed with your letter and is reflected in the April 11, 1986, letter to this agency from MARAD (copy enclosed) that states in part:

> "The only situation where a U.S.-flag with foreign flag relay offer is not considered valid U.S.-flag service under P.L. 664, is when such service is offered against all U.S.-flag service from the same origin port to the same destination port (Comptroller General Opinion B-145455). However, since no other U.S.-flag carrier can provide all U.S.-flag service from West Coast origins to destinations in India and Indonesia, APL's service is totally qualified as U.S.-flag service and we will record it as such under your program."

Our second point of disagreement is with your challenge to our long-standing policy regarding the procedure for commodity purchasing by suggesting that CCC must give priority to carriers providing all U.S.-flag service prior to contracting. In order to maximize the funds appropriated for programs such as Title II, P.L. 480, CCC contracts for commodities on the principle of the lowest landed cost. In the case of bagged, processed, or fortified commodities furnished for the Title II program, CCC is required by law to procure and allocate 50 percent of the commodities on the principle of lowest landed cost without regard to the country of documentation of the vessel. CCC is free to purchase the remaining 50 percent in the manner it deems appropriate. The procedures followed for Invitation 024 were consistent with our long-standing policy and the principles reflected in the City of Milwaukee v. Yeutter decision.

Finally, we are concerned that the MARAD position on this issue has not been properly analyzed to determine the impact on the different types of U.S.-flag service. We understand through conversations with other U.S.-flag carriers that they have not been consulted or advised on this change in MARAD's policy. In our view, if a change in the manner of prioritizing U.S.-flag service is contemplated by MARAD, the entire U.S.-flag shipping industry should be given the opportunity to respond. We believe this is necessary in view of the significance of this change and since the Comptroller General opinions do not seem to support the MARAD view.

We will continue our current policy of considering U.S.-flag service with a foreign flag feeder to destination as valid U.S.-flag service when all U.S.-flag service from the same origin port range is not available.

Sincerely,

Grant Buntrock

Grant Buntrock
Administrator

Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Farrell Lines Incorporated Plaintiff,	)	
v.	)	Civil Action No. 1:98CV02046 EGS
United States Department of Agriculture et al. Defendants.	)	

ORDER

Upon consideration of the joint motion of Plaintiff and Federal Defendants for entry of an agreed order disposing of this action, and of the entire record and of the absence of any opposition thereto, it is by the court this 16th day of September 1998:

ORDERED that defendant United States Department of Agriculture shall measure compliance with the requirements of the cargo preference laws with respect to Food for Progress and Section 416(b) programs on a country-by-country basis to the extent practicable and unless determined otherwise by the United States Department of Agriculture after consultation with defendant Maritime Administration, or the cargo preference regulation or policy is duly revised by the Maritime Administration; such consultation as provided in the United States Department of Agriculture policy shall include good faith negotiations by the United States Department of Agriculture with the defendant Maritime Administration prior to fixing cargo; and it is further

ORDERED that defendant United States Department of Agriculture with respect to the Food for Progress and Section 416(b) programs shall defer to the cargo preference priority policy of the Maritime Administration as now constituted, a copy of which is attached hereto, or as it may be duly revised by the Maritime Administration; the current policy provides that if an ocean carrier were to offer to carry cargo from a U.S.-port area overland on a F.A.S. basis or an intermodal basis to connect with its all U.S.-flag vessels, the service will be fully eligible to carry the cargo and will be recognized as a first priority service for the same type of service under the cargo preference laws under the Maritime Administration cargo preference priority rules as currently constituted; and it is further

ORDERED that the United States Department of Agriculture will expedite its consideration of plaintiff's pending claims in connection with shipments made under the Food for Progress Program; and it is further

ORDERED that the action is dismissed with prejudice and each party shall bear its own costs and fees.

United States District Judge

US Department of Transportation

Maritime Administration

Prioritization of U.S.-Flag Shipping Services for Compliance With the Cargo Preference Requirements of the Cargo Preference Act of 1954

In order to set out simply the basic principles of prioritization of U.S.-flag shipping requirements under the Cargo Preference Act of 1954 (Public Law 664), 46 U.S.C. 901, to meet the needs of the shipping community, the following general guidance has been prepared to summarize existing requirements under governing authorities. Requests for further information may be directed to this office. Our new telephone is (202) 366-4610.

The Maritime Administration's prioritization of U.S.-flag service for cargo preference purposes is as follows:

(1) The following all U.S.-flag vessel services have equal status in the selection by shippers of preference cargoes:

(a) U.S.-flag vessel service (U.S.-flag vessel with relay/transshipment to another U.S.-flag vessel to final discharge port);

(b) Direct U.S.-flag vessels service;

(c) Intermodal services to the final destination or from the point or port of origin utilizing only U.S.-flag vessels for any water-borne portion.

(2) In the event that all U.S.-flag vessel service as described in Paragraph (1) above is not available, U.S.-flag vessels with relay or transshipment via a foreign-flag vessel to final discharge port is the acceptable and required U.S.-flag service under the statute.

Federal agencies and/or their program participants may not make determinations of non-availability without the Maritime Administration's concurrence of the criteria utilized.

We suggest that you also service Comptroller General Opinions of B-145455 dated June 12, 1968, B-148872 dated May 10, 1968, B-163421, December 23, 1968, and B-155185 dated November 17, 1969, as they relate specific cargo preference concepts relative to U.S.-flag vessel services.

Sincerely,

for S. THOMAS ROMEO
Chief and Inter-Agency Liaison
Division of National Cargo
Office of Market Development

Possible Win-Win Actions

- Implement Simplified FBES to save carrier entries & computer run times
  - Use Ex-works & Free Carrier terms for commodity purchasing
    - Get rid of improper FAS use
  - Use destination bidding
- Must incorporate all cargo preference requirements so computer makes booking decisions

EXHIBIT 4

EXHIBIT 5

ORIGINAL

DEPT. OF TRANSPORTATION
DOCKETS

99 APR 28 PM 12:38

APR 28 1999

U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

54356

Docket Clerk, DOT Dockets
Room PL-401
400 7th Street, SW
Washington, D.C. 20950

Ref: Docket No. MARAD-99-5038 — 8

The U.S. Agency for International Development (USAID) would like to take this opportunity to respond to the Maritime Administration (MARAD) advance notice of proposed rulemaking published in the Federal Register January 28, 1999.

USAID comments concern the scope of the rulemaking. USAID commends MARAD for starting the much-needed process of regulatory reform. However, we are disappointed that MARAD has not taken this opportunity to fully vet the issue of Cargo Preference compliance. We feel that it is imperative that any rule published by MARAD apply to all cargo and federal agencies and departments administering such cargo falling under the statute, not limited to agricultural exports. Many issues have arisen over the years as the result of a changing maritime industry or changing federal programs. These issues have been addressed agency by agency on an *ad hoc*, rather than a comprehensive, basis. We now have a web of Comptroller General Opinions, internal MARAD legal opinions and court decisions that interpret regulations that are no longer on point. Having rules, definitions or procedures that differ from one agency to another leads to confusion, misinterpretation and a sense of inequality.

We recommend that MARAD conduct a review of this array of past practices, policies, regulations and legal guidance to determine what is appropriate in view of the changing maritime industry and federal programs. We would like to see the new regulation address head on the reality of today's shipping industry and fleet. It should also be flexible enough to adapt to inevitable future changes in the shipping industry.

The difficulties for USAID's food aid programs are compounded by the fact that the Farm Bill of 1985 increased the required tonnage of food aid exports that must be shipped on U.S. flag vessels from 50 to 75 percent. This increased the burden on USAID to best utilize the diminishing U.S. fleet to carry the required tonnage. However, the issues themselves cut across the board to all types of cargo and to all agencies and departments administering such cargo. The central issues are the diminishment of and changes in type of service offered and the make-up of the U.S. fleet. The loss of break bulk liner service in the fleet has required us to use "bulk carrier" type vessels to move packaged goods. For years we have been forced to use tankers to move bulk agricultural products. Where once there

was abundant regular scheduled liner service to the non-traditional destinations, i.e., West Africa, there are now a very limited number of companies providing that service. In many cases there is only one U.S. carrier to any given destination. In order to meet cargo preference requirements we are forced to sacrifice some programmatic needs.

Before MARAD issues any proposed rule they should consider a few basic questions. First and foremost, what types of vessels are entitled to protection under the Cargo Preference Act as "necessary for the national defense and development of [U.S.] foreign and domestic commerce"? Should any agency or department be required to use inappropriate vessels because they are protected? What is commercially acceptable service for our programs, e.g., since U.S. flag/foreign feeder service is commercially accepted worldwide, should it not be considered as acceptable as all U.S.-flag service? How can programs subject to the Cargo Preference Act most economically utilize the U.S. fleet? Taking into consideration the different objectives of each agency and department and the programs they administer, what is the most flexible method of compliance with the Cargo Preference Act? USAID looks forward to meeting with MARAD to discuss these issues.

In the event that MARAD does not elect to widen the scope of the rule making and issues a proposed rule with the limited scope in your ANPR, we will address specific issues after the proposed rule is published. Note that even with the limited scope of the proposed rule we see this as a significant economical regulatory action and would expect MARAD to produce the appropriate economical study in accordance with E.O. 12866 to support the rule.

Sincerely,

Robert M. Goldman, Chief
Transportation and
Commodity Division
Office of Procurement

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GULFCOAST TRANSIT COMPANY, Plaintiff,	)	
v.	)	Civil Action No. 01-00768 RWR
BRUCE J. CARLTON, et al., Defendants.	)	

MOTION FOR FURTHER ENLARGEMENT OF TIME AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendants, by their undersigned attorneys and pursuant to Fed. R. Civ. P. 6(b), hereby move for a further enlargement of time, to and including September 17, 2001, within which to respond to plaintiff's complaint in this case. This motion is being filed to correct the error in the caption of the motion to this effect that was filed on August 17, 2001. In support of this motion, defendants state as follows:

1. Defendants' response to plaintiff's complaint is currently due on August 20, 2001.

2. This case, and the two related cases, concern the interpretation of the Cargo Preference Act. The federal agencies which are the defendants in the litigation have admittedly not interpreted the statutory provisions at issue in a uniform manner.

3. The defendant agencies' differing interpretations of the Cargo Preference Act have been referred to appropriate

officials at the Department of Justice, who are reviewing the matter with a view toward resolving the conflict so that there will be a unitary position of the United States with respect to plaintiff's claims. Because that review and coordination process has not yet been completed, defendants are requesting a further enlargement of time to respond to the complaint.

4. Counsel for the plaintiffs in this and the related cases have stated that their clients do not oppose the requested extension of time. Counsel for the proposed intervenors have also stated that they do not oppose the requested extension of time.

Therefore, in view of the foregoing and the entire record herein, defendants respectfully request that the Court grant this motion and extend the time for defendants' to respond to plaintiff's complaint to and including September 17, 2001. A proposed Order is attached.

Respectfully submitted,

ROSCOE C. HOWARD, Jr., D.C. Bar #246470
United States Attorney

MARK E. NAGLE, D.C.Bar #416364
Assistant United States Attorney

FRED E. HAYNES, D.C. Bar#165654
Assistant United States Attorney
555 4th Street, N.W., Room 10-445
Washington, D.C. 20001
(202) 514-7201

EXHIBIT 7

-----Original Message-----
From: Harrelson, Tom [mailto:Tom.Harrelson@marad.dot.gov]
Sent: Thursday, January 08, 2004 3:15 PM
To: PJS@libertymar.com (E-mail); John Raggio (E-mail); Kgaulden@Mllnet.Com (E-mail); Mensing, Eric; Jim Madden (E-mail); Jim Wachtel (E-mail); Charles Nolfo (E-mail); Fred Begendorf (E-mail); Alan Butchman (E-mail); Steve Gill (E-mail); Joe Sanders (E-mail); Bryan Alix (E-mail); 'Cliff.Johnson@tecoenergy.com'; 'scarmel@mllnet.com'; Kurz, R; MATSON-Garvin, Mike; 'georgec@redrivershipping.com'; 'jwhite@ahlsc.com'; Carleton, Bruce B; 'ceklofjr@k-sea.com'; 'rrsc@patriot.net'
Cc: Boggs, Charles E; Charles Weymouth (E-mail); Yarrington, Michael; Brennan, Dennis; 'bmcgale@mllnet.com'
Subject: Economic Impact of Regulation Change

Dear Colleague:

As you know, we are continuing our efforts to update the cargo preference regulations. The proposed regulations are at OMB for clearance prior to publishing them for public comment. AID and USDA are requesting many changes to the proposal before we request public comment. Primary among the requested changes are defining vessel type (liner, bulker, tanker) by the type of cargo carried rather than by the design of vessel. Historically, we have always defined the three types of vessels in the Act by construction design.

AID and USDA propose that any vessel-voyage that carries bagged cargo would be called a "liner" and any vessel that carries bulk cargo would be called a "bulker" while any vessel that carries bulk liquid cargo would be called a "tanker". There is no proposal yet on what to call a vessel-voyage carrying two different types of cargo or whether to score it as two vessel types for the same voyage. Scoring by cargo would have the effect of reducing the amount of cargo required on U.S-flag vessels since it would no longer require 75% by three different vessel types but merely 75% by cargo type. Also, it would introduce more competition into the bidding process. Both results should reduce the cost of cargo preference to AID/USDA but we do not know the impact on the U.S.-flag merchant marine and thus the overall long term impact on the American taxpayer.

OMB has asked MARAD and AID/USDA to determine the economic impact of changing from "design" to "cargo" for scoring purposes.

We would appreciate your input as to the potential impact on your US-flag operations if scoring were done by type of cargo rather than by type of vessel. Would you lose or gain vessels and crew? Would your bottom line be impacted up or down? Would your corporate viability be threatened or enhanced? Would there be no impact? Can you put the "guesstimate" of potential impact in dollar figures and number of vessels and crew on your responses?

Your soonest response is requested. Preferably by noon Monday.

Thanks,
Tom